No. 201PA12 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

MARGARET DICKSON, *et al.* *Plaintiffs*, v. ROBERT RUCHO, *et al.* *Defendants*.	)	**From Wake County**
NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP; *et al.* *Plaintiffs*, v. THE STATE OF NORTH CAROLINA, *et al.* *Defendants*.	)	

LEGISLATIVE DEFENDANTS' RESPONSE TO PLAINTIFFS-APPELLEES' MOTION FOR RECUSAL OF PAUL NEWBY

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PLAINTIFFS-APPELLEES' MOTION FOR RECUSAL OF PAUL NEWBY

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

The Legislative Defendants respectfully submit this response to plaintiffs' Motion for Recusal of Justice Paul Newby.[1] For the reasons that follow,

[1] The defendants in these cases include Senators Philip E. Burger and Robert Rucho, and Representatives Thom Tillis and Davis Lewis ("the Legislative

plaintiffs' motion lacks any legal basis because recusal is neither required nor advisable under the circumstances of this case.

FACTS

A. Procedural History

This matter is on appeal of an order of a three-judge panel of the Superior Court of Wake County allowing in part plaintiffs' motion to compel the production of certain documents the legislative defendants assert are privileged under the attorney-client privilege or work product doctrine. Additional history is contained in the Legislative Defendants' Brief, pp. 2-3, which is incorporated herein by reference as though fully set forth.

Oral argument was heard in this matter on 10 July 2012.

B. Factual History

The facts underlying the appeal are as set forth in the Legislative Defendants' Brief, pp. 4-11, which is incorporated herein by reference as though fully set forth.

Defendants"). While the State of North Carolina, the North Carolina State Board of Elections and Representatives Nelson Dollar and Jerry Dockham are also defendants, plaintiffs' motion must relate to the pending appeal, in which the Legislative Defendants are the only appellants. R. p. 584.

REASONS WHY THE MOTION LACKS A LEGAL BASIS AND WHY RECUSAL IS NEITHER REQUIRED NOR ADVISABLE

Plaintiffs contend that Justice Newby must recuse himself from participating on the decision on the Legislative Defendants' pending appeal in this matter – and ostensibly any future appeal that may arise from these actions – solely because political organizations not affiliated with, controlled by, or even coordinating with Justice Newby's campaign spent money in support of his candidacy for the Supreme Court during the 2012 election cycle. This contention is not supported by the law and could have the effect of requiring judges at all levels to recuse themselves unnecessarily from hearing a wide range of cases. The motion in effect seeks to insert politics where it does not belong, in the judicial process. In doing so, plaintiffs' motion unnecessarily questions the integrity of this Court and raises an unfair—and unfounded—suggestion that this matter will be decided based upon political allegiances rather than the law and facts before the Court. The Legislative Defendants have complete confidence that Justice Newby, and indeed all members of this Court, can and will hear and decide this appeal on its legal merits and not on the basis of any perceived partisan interests.

I. PLAINTIFFS' MOTION IS UNTIMELY.

Plaintiffs' motion for recusal is untimely for two reasons. First, the motion comes seven months after Legislative Defendants' appeal of the trial court's 20 April 2012 order was filed and over four months after briefing closed and the

Court heard oral argument in this matter. Based on this lapse of time alone, it is difficult to see how Justice Newby's recusal would be possible at this point, given the time that this matter has been pending before the Court, together with the likelihood that Justice Newby has already been involved in the consideration of the issues on appeal.

It would appear that the timing of plaintiffs' motion was predicated not on the facts outlined in the motion but on the desire to wait and see the results of the election for Justice Newby's seat. Plaintiffs' motion highlights statements from newspapers, editorialists and other pundits dating as far back as 5 June 2012, and numerous others published in July and August 2012 in support of their contention that there exists a "widespread perception that Justice Newby is predisposed to uphold the constitutionality of the legislative and congressional districts challenged in this litigation." (Motion, p. 15) Moreover, campaign finance filings from the independent expenditure committees detailing the contributions and expenditures by these groups were available to plaintiffs before the election. Yet, despite the alleged "widespread perception" about Justice Newby's supposed predilection to rule in the Legislative Defendants favor in this matter, plaintiffs waited until after the results of the election were known before filing their recusal motion.

Although this Court has not addressed the timing of a motion of recusal, the North Carolina Court of Appeals has held that a recusal motion must be raised "at

the earliest moment after acquiring knowledge of the facts which give rise to the motion to recuse." *State v. Pakulski*, 106 N.C. App. 444, 417 S.E.2d 515, 519 (1992) (citation omitted). *See also Sine v. Local No. 992 Int'l Broth. of Teamsters*, 882 F.2d 913, 915 (4th Cir. 1989) ("In general, motions to recuse must be filed at the first opportunity after discovery of the facts tending to prove disqualification.") (citing *Duffield v. Charleston Area Medical Center*, 503 F.2d 512, 515 (4th Cir.1974); *Chafin v. United States*, 5 F.2d 592, 595 (4th Cir.), *cert. denied*, 269 U.S. 552 (1925)). Here, there is no explanation for why plaintiffs have waited until now to file their motion. As such, plaintiffs' recusal motion is untimely.

Second, despite specifically stating that plaintiffs "move for the recusal of Justice Paul Newby in the above-captioned matter" (Motion, p. 4), the motion appears at times to seek Justice Newby's recusal from participating in any other appeal that might be filed in the future in these actions. It goes without saying that a motion for recusal in appeals that are not currently pending and that are, at this time, only speculative, is not ripe. For this reason as well, the motion is untimely.

II. THE MOTION IS NOT WELL-GROUNDED IN LAW

Plaintiffs' recusal motion is based upon three principal authorities: (1) the United States Supreme Court's decision in *Caperton v. A.T. Massey Coal Co.,* 556 U.S. 868 (2009); (2) this Court's decision in *Ponder v. Davis*, 223 N.C. 699, 65

S.E.2d 356 (1951) and; (3) Canon 3C of the North Carolina Code of Judicial Conduct. None of these authorities support plaintiffs' motion.

A. The Facts Underlying the United States Supreme Court's Holding in *Caperton v. A.T. Massey Coal Co.* Differ in Material Ways from the Facts Outlined in Plaintiffs' Motion.

In their motion, plaintiffs insist that the U.S. Supreme Court's decision in *Caperton v. A.T. Massey Coal Co.,* 556 U.S. 868 (2009) requires Justice Newby's recusal from any appeal in this matter. Specifically, plaintiffs cite the following language from the *Caperton* decision:

> We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when *a person* with a *personal stake* in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent.

556 U.S. at 884 (emphasis added).

Plaintiffs, in their motion, incorrectly focus on (1) comparing the amounts of money spent in *Caperton* to the amounts of independent expenditures made in Justice Newby's race; and (2) whether these expenditures "had a significant and disproportionate influence in placing" Justice Newby in a position to hear this appeal.[2] In doing so, they ignore the critical language in this passage that requires

[2] There is no judicially manageable standard explained by plaintiffs for determining when independent expenditures or other election conduct in support of a candidate constitutes a "disproportionate influence." Plaintiffs' evidence in support of an alleged "disproportionate influence" includes opinion polls done by

that such expenditures be made by "*a person with a personal stake in a particular case*" – not persons with shared political views – before recusal is warranted under *Caperton*. Plaintiffs' motion fails to show that the independent expenditure entities that they contend made independent expenditures in support of Justice Newby – or the donors that contributed to them – had a "personal stake" in this litigation. Accordingly, plaintiffs' reliance upon *Caperton* is misplaced.

It is important to recognize that the defendants in this litigation are the people of North Carolina and their elected representatives, who are sued in their official capacities, not private parties. Unlike the defendants in *Caperton*, *none* of the organizations identified by plaintiffs as making independent expenditures in support of Justice Newby's candidacy – Justice for All NC ("Justice for All"), the NC Judicial Coalition ("Judicial Coalition"), the John W. Pope Civitas Institute ("Civitas"), or Americans for Prosperity ("AFP") – are defendants in this lawsuit. Similarly, *none* of the major donors to these organizations identified by Plaintiffs – the Republican State Leadership Committee ("RSLC") or the Pope Foundation – are defendants in this lawsuit. This alone distinguishes this matter from *Caperton* and defeats plaintiffs' argument that any of these organizations have a "personal stake" in the outcome of this litigation.

one of their expert witnesses in this case, Public Policy Polling. Neither these polls, nor anything else in plaintiffs' motion, could lead any reasonable fact-finder to determine the exact reasons why Justice Newby prevailed or whether the independent expenditures in support of Justice Newby were "disproportionate."

Second, *Caperton* involved a dispute between two private parties over money. *See Caperton*, 556 U.S. at 886 ("So it became at once apparent that, absent recusal, Justice Benjamin would review a judgment that cost his biggest donor's company $50 million."). Here, plaintiffs are not seeking any monetary relief from defendants. Instead, in the underlying actions, they have requested injunctive relief to stop the use of legislative and Congressional districts duly enacted by the General Assembly, and in the appeal currently before the Court they seek documents for which the Legislative Defendants have asserted attorney-client or work product privilege. In contrast to the facts in *Caperton*, plaintiffs have not shown that the outcome of this litigation will affect the financial interests of any of the independent expenditure committees who plaintiffs identify in their brief or their respective donors.

Nothing in *Caperton* requires that Justice Newby recuse himself from this litigation because he received support from independent political committees, that are not parties to this action and that see themselves as having a political rather than financial interest in his re-election. Plaintiffs have identified no authority – and undersigned counsel has found none – holding that any "stake" other than a direct financial interest in pending litigation is sufficient to necessitate recusal under *Caperton*.

In addition to plaintiffs' failure to show that any of the independent expenditure committees they identify in their motion or their donors have a "personal stake" in these actions, plaintiffs also have not shown that any one individual made disproportionate expenditures or contributions to support Justice Newby's re-election. Instead, plaintiffs attempt to aggregate all of the expenditures made by several entities, and an unknown number of contributions to each of these entities, in support of Justice Newby to argue that these expenditures are equivalent to those at issue in *Caperton*.

For example, plaintiffs contend that expenditures highlighted in their motion are analogous to those in *Caperton* because Art Pope, who has served in a limited role as *pro bono* counsel for Senator Rucho and Representative Lewis during the redistricting process but who has not appeared on any pleading or hearing before this Court, served as a Board Member of Civitas and AFP, and can be linked to donations made to these organizations and to the RSLC. However, an analysis of the claims made by plaintiffs in their motion reveals at least six degrees of separation between Mr. Pope and the television ads purchased by the Judicial Coalition in support of Justice Newby.[3] Such exaggerated and highly attenuated

[3] According to plaintiffs, Art Pope's "personal stake" in this litigation and his responsibility for the Judicial Coalition's spending in support of Justice Newby would be based upon the following: (1) Art Pope was a *pro bono* attorney to Sen. Rucho and Rep. Lewis; (2) Art Pope is the owner/CEO of Variety Stores, Inc.; (3) Variety has made donations to the RSLC, including $150,000 to RSLC in 2012; (4)

linkages are simply not sufficient to require Justice Newby's recusal from this matter. *See U.S. v. DeTemple*, 162 F.3d 279, 287 (4th Cir. 1998) (holding that a judge is not required to recuse based upon "unsupported, irrational, or highly tenuous speculation" because "[t]o disqualify oneself in such circumstances would be to set 'the price of maintaining the purity of appearance' too high—it would allow litigants 'to exercise a negative veto over the assignment of judges.'") (citations omitted).

B. This Court's Decision in *Ponder v. Davis* Provides No Basis for Plaintiffs' Recusal Request.

In addition to *Caperton*, plaintiffs also rely upon this Court's decision in *Ponder v. Davis,* 233 N.C. 699, 65 S.E.2d 356 (1951). But *Ponder*, like *Caperton*, is inapposite to the facts at issue here. In *Ponder*, this Court found that a trial judge who personally campaigned for the Democratic candidate for sheriff should have recused himself from presiding in a lawsuit that would have decided the outcome of a disputed election between that candidate and his Republican opponent. 233 N.C. at 701-03, 65 S.E.2d at 357-59. In other words, in *Ponder*, the trial judge clearly indicated a preference for the Democratic candidate by

the RSLC donated to $1,1655,000 Justice for All; (5) Justice for All made contributions to the Judicial Coalition; (6) the Judicial Coalition made independent expenditures for television ads in support of Justice Newby in October 2012. (Pl's Motion for Recusal, pp. 10-13.)

campaigning directly for his election prior to sitting in a case which would have decided whether that candidate prevailed in the election.

No such facts exist here. Plaintiffs' claims that Justice Newby cannot be "impartial" is based not upon any statement made by Justice Newby regarding these actions but instead upon statements by others – primarily commentators and editorialists – that make assumptions about how Justice Newby might rule on the merits of this case, should it come before him, and upon statements of Republican candidates with whom Justice Newby appeared at campaign events and who expressed support for his re-election bid. Plaintiffs' reliance upon articles and editorials from the Raleigh *News & Observer* to prove an alleged public "perception" about Justice Newby's impartiality in these actions is particularly dubious. (Motion, p. 15 *et seq.*) In an editorial prior to the election, the newspaper's editorial board endorsed Justice Newby's opponent, Judge Sam J. Ervin, IV, on the grounds that Judge Ervin, a Democrat, would be a likely vote against the redistricting maps drawn by the Republican General Assembly. *See For the Court*, The News & Observer, October 7, 2012 (endorsing Judge Ervin and stating that "[a]n Ervin victory might eventually bring North Carolina's redistricting back toward middle ground.") (copy attached as Exhibit 1).

Despite their best efforts to show a "widespread public perception" that Justice Newby will rule in Defendants' favor in this matter, plaintiffs have not

cited and cannot cite any statement by Justice Newby that he has prejudged the merits of this matter. Nor have they identified any statement by Justice Newby affirming any of the comments made by any of the commentators, editorialists, or other candidates regarding how he might view the legal issues at stake in this litigation. Plaintiffs' attempt to analogize the facts of this case with the facts of *Ponder* are unavailing; *Ponder* does not support plaintiffs' motion or require Justice Newby's recusal here.

C. The North Carolina Code Of Judicial Conduct Does Not Require Justice Newby's Recusal.

Plaintiffs contend that Justice Newby's recusal is required by Canon 3(C)(1) of the North Carolina Code of Judicial Conduct, which requires recusal when "the judge's impartiality may reasonably be questioned" and goes on to list specific circumstances where this may occur. Contrary to plaintiffs' suggestion in their motion, this language does not mean that a judge must recuse himself whenever there might be an appearance of impropriety. (Motion, p. 37) Indeed, this Court expressly removed any such requirement from the Code of Judicial Conduct in 2003. Michael Crowell, *Recusal*, Administration of Justice Bulletin, No. 2009-03, N.C. School of Government, p. 6 (September 2009) (copy attached as Exhibit 2).

Consistent with the elimination of the "appearance of impropriety" language from the Code of Judicial Conduct, this Court has rejected the notion that recusal is warranted in instances where there is no actual violation of the Code of Judicial

Conduct but where circumstances exist that "would cause a reasonable person to question whether [the judge] could rule impartially." *See Lange v. Lange*, 357 N.C. 645, 649, 588 S.E.2d 877, 880 (2003). Instead, this Court has held that a party making a recusal motion bears the burden to "demonstrate *objectively* that grounds for disqualification *actually exist*" and to produce "*substantial evidence* that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially." *Id.* (emphasis added); *see also In Re Braswell*, 358 N.C. 721, 724, 600 S.E.2d 849, 851 (2004). In other words, "if there is no actual evidence of bias then a reasonable person would not question the judge's ability to rule impartially." Crowell, *Recusal*, Administration of Justice Bulletin, No. 2009-03, N.C. School of Government, p. 6.

Here, plaintiffs have not only failed to demonstrate any "substantial evidence" of any "personal bias, prejudice or interest" by Justice Newby in this action, they have specifically stated that they "do not intend to imply that Justice Newby has demonstrated actual bias against them." (Motion, p. 37) Given plaintiffs' admission that there is no evidence of actual bias on the part of Justice Newby, plaintiffs cannot show that a reasonable person would question his ability to rule impartially in this litigation as contemplated by Canon 3(C)(1). Justice Newby's participation in the pending appeal or other participation in this matter therefore does not violate any part of the Code of Judicial Conduct.

III. RECUSAL ON THE GROUNDS RAISED IN THE MOTION COULD IMPAIR THE COURTS' ABILITY TO FUNCTION, AS IT COULD REQUIRE JUDGES AND JUSTICES TO RECUSE THEMSELVES SOLELY BECAUSE OF THE ACTIONS OF THIRD PARTIES.

The recusal standard urged by plaintiffs in their motion is inconsistent with the past recusal practices of members of this Court, ignores plaintiffs' own efforts to elect Judge Ervin in the 2012 election, and is practically unworkable as it would require most members of the Court to recuse themselves from critical cases. Moreover, such a standard threatens the constitutional rights of individuals and entities that make independent expenditures in judicial races, while simultaneously holding judges and justices responsible for expenditures and communications over which they have no control.

Since at least 2006, independent expenditures in judicial races by individuals and entities that frequently appear before this Court as parties, counsel to parties, or amici curiae have not prompted recusals by members of this Court who benefitted from these expenditures. For example, during the 2006 general election in which Chief Justice Parker and Justices Martin, Timmon-Goodson, and Hudson were on the ballot, a non-profit group known as "FairJudges.net" (hereinafter "FairJudges") reported spending $259,101 to run television advertisements touting each of these justices as "fair judges" in the days immediately preceding the November 2006 election. These ads constituted "electioneering communications" with respect to these candidates, which required FairJudges to have to report the

amounts it spent on these ads, along with those who donated money to pay for them, to the State Board of Elections. (A copy of these reports is attached as Exhibit 3.)

Burley Mitchell, a former Chief Justice and lawyer in private practice, served as Chairman of FairJudges. Andrea Weigl, *TV Ads Highlight 4 Candidates: Some Question Legality of Spending by FairJudges.net*, The News & Observer, October 31, 2006, at 5B (copy attached as Exhibit 4.) The ads run by FairJudges were funded with reported contributions from approximately 21 different individuals and interest groups totaling $251,275. *See attached* Ex. 3. The North Carolina Democratic Party was the largest donor to FairJudges, making contributions totaling $75,000, or 29.85% of all funds reported by the group. *Id.* The political action committee of the North Carolina Academy of Trial Lawyers PAC ("NCATL"), now known as the North Carolina Advocates for Justice ("NCAJ"), was the second largest donor to FairJudges, contributing $66,275, or 26.38% of all funds reported by the group. *Id.* All four of the Justices featured in the ads run by FairJudges won their elections. Brian P. Troutman, Comment, *Party Over? The Politics of North Carolina's "Non-Partisan" Judicial Elections*, 86 N.C. L. Rev. 1762, 1783 (2008).

Since the 2006 election, the NCATL and the NCAJ have appeared and taken a position on pending issues before this Court on at least 22 occasions as *amici*

curiae.[4] There is no indication that any of the four Justices who were featured in the television ads run by FairJudges recused themselves from participating in the decision in any of these cases based upon the contributions by the NCATL PAC to FairJudges.[5]

Similarly, Former Chief Justice Burley Mitchell appeared as counsel for litigants or *amici curiae* in at least 10 cases before this Court decided since the 2006 election.[6] Although he served as chair of FairJudges, there is no indication that any of the four Justices who were featured in the ads run by FairJudges recused themselves in any of these matters due to Chief Justice Mitchell's leadership of FairJudges and participation in the case.

Yet another example exists in the same context at issue in this case: redistricting. Even though the North Carolina Democratic Party was the largest donor to FairJudges,[7] when this Court heard *Pender County v. Bartlett*, a

[4] These 22 cases are listed at App. pp. 1-2.

[5] During the 2012 election cycle, the NCAJ was the largest contributor to North Carolina Citizens for Protecting Our Schools ("NCCPOS"), an independent expenditure committee that supported Judge Ervin. The NCAJ gave NCCPOS $114,275 or 33% of the $344,275 it reported raising to provide support for Judge Ervin's campaign against Justice Newby.

[6] These ten cases are listed at App. p. 3.

[7] In addition to being the largest donor to FairJudges, the Democratic Party reportedly spent another $235,000 on mailers to support Democratic judges during the 2006 election, including Chief Justice Parker and Justices Timmons-Goodson and Hudson. The Republican Party reportedly spent $91,000 promoting Republican judges, including Justice Martin, during 2006. *See* Troutman, 86 N.C. L. Rev. at 1782.

redistricting matter challenging the enacted House Plan in 2007, none of the four Justices featured in the television ads run by FairJudges recused themselves, and there is no record of any party making a motion for recusal as the plaintiffs have done here. 361 N.C. 491, 649 S.E.2d 364 (2007)

The recusal patterns noted in the above examples demonstrate that the members of this Court do not have a history of recusal in cases where either a leader or principal donor to a group that makes independent expenditures in support of their election appears before the Court. Recusal in situations such as those outlined above were clearly unnecessary because there was no evidence that any members of this Court were predisposed to rule in favor of the NCATL, NCAJ, or Chief Justice Mitchell because of their involvement with FairJudges. And, until plaintiffs' motion in this action, it appears that no party has even considered the possibility of recusal on these grounds.

Just as there was universal agreement that recusal was not warranted in the above-cited cases, Justice Newby's recusal is not required here. Plaintiffs have provided nothing beyond speculation that Justice Newby might be perceived as being predisposed to rule in the State's favor in this litigation due to the efforts of the independent expenditure organizations they have identified. If anything, the connections strung together by plaintiff to show Justice Newby's propensity for

bias are far more attenuated here. Unlike the cases cited above, none of the donors to these independent expenditure organizations are parties in this lawsuit nor are they representing parties in this lawsuit.

In addition to conflicting with this Court's previous recusal practices, plaintiffs' motion ignores plaintiffs' own efforts to influence the outcome of the 2012 race between Justice Newby and Judge Ervin. For example, representatives of plaintiffs NC NAACP, the A. Phillip Randolph Institute, and Democracy NC, all testified in deposition taken in these actions that their respective groups engage in voter registration and Get-Out-The-Vote ("GOTV") efforts each election cycle. *See* Deposition of William Barber ("Barber Dep."), pp. 29, 39; Deposition of Melvin Montford, pp. 10, 22, 29; Deposition of Bob Hall ("Hall Dep."), p. 152. Although labeled as "non-partisan," these GOTV efforts are primarily aimed at getting minorities and young people, constituencies that overwhelming vote for Democrats, to the polls. *See* Barber Dep. 29; Hall Dep. 152. In a system where judges and justices are elected, these GOTV efforts, like the independent expenditures made in support of Justice Newby, involve political speech that is protected by the First Amendment. These expenditures no more require any member of this Court to recuse themselves than the independent expenditures in support of Justice Newby made by individuals and groups that are not parties to this litigation.

As a practical matter, the recusal standard plaintiffs urge the Court to adopt here is simply unworkable and fraught with problems. It would require each member of the Court to research whether every party or attorney who appears before them had ever expended money on his or her behalf during a previous campaign or contributed money to an independent expenditure committee that did, or whether such parties, attorneys or independent expenditure committees ever made statements that could be construed as calling that member's impartiality into question. Then, if a Justice identified any such linkage, under plaintiffs' recusal standard, the Justice would then be required to recuse him- or herself from the case. According this recusal standard, the four members of this Court who were featured in the ads run by FairJudges would be required to recuse themselves any time the NCAJ took a position by filing an amicus brief or Chief Justice Mitchell appeared on behalf of a party in a case. This would prevent a majority of the Court's members from deciding matters of critical importance to the State. Clearly, such a standard is unworkable and untenable.

The practical effort of such a recusal standard, if adopted, is to chill the speech and activities of independent expenditure groups such as those indentified by plaintiffs in their motion. If plaintiffs' motion is granted, then individuals and other entities such as these who are engaged in political speech—speech that is at the core of the First Amendment—will be effectively shut out of participating in

the political process in the future out of fear that doing so could cause members of this Court to recuse should they or their donors or organizers find themselves as a litigant in a matter that must be decided by this Court. And at the same time, members of this Court would be held accountable for statements and actions over which they had no control.

In his dissent in *Caperton*, Chief Justice Roberts warned of the dangers inherent in motions such as that filed by plaintiffs, saying: "This will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be. The end result will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case." *Caperton*, 556 U.S. at 891 (Roberts, C.J. dissenting). The motion filed by plaintiffs here poses just such a problem. Neither the law nor the facts require recusal in this case. A determination that recusal is required, on the other hand, risks the creation of numerous problems for judges and citizens alike.

IV. THE MOTION IS PREDICATED ON AN ASSUMPTION THAT PARTISAN INTERESTS INFLUENCE A JUDGE'S DECISIONS

Plaintiffs' motion appears to be predicated on an assumption that an elected Justice of this Court whose election was supported by those with a partisan perspective will be swayed by partisan interests. This unsupported assumption is of course false, as can be seen in the many decisions by elected judges in North Carolina who have voted against the perceived interest of their party.

One example of such a case is *Stephenson v. Bartlett*, 358 N.C. 219, 595 S.E.2d 112 (2004) (*Stephenson III*), the third decision in the *Stephenson* trilogy, in which all of the Republican members of this Court voted against the "Republican position" by rejecting the *Stephenson* plaintiffs' arguments in that appeal that a recently enacted statute taking jurisdiction away from the Superior Court of Johnston County for any further proceedings violated the Constitution. More recently, in *Queen v. Hise*, No. COA12-455, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 20, 2012), a special superior judge appointed by Governor Perdue, the Honorable Gary Trawick, a registered Democrat, granted the motions of Republican plaintiffs for summary judgment in a case brought by Democratic Senator Joe Sam Queen alleging that television ads authorized by Republican candidate Ralph Hise violated the state's Stand-By-Your-Ad law. On appeal, Court of Appeals Judge Cherie Beasley, also a registered Democrat, voted with the court's majority to affirm Judge Trawick's order granting summary judgment.

Many other examples can be found where both Democratic and Republican judges and justices voted against the perceived positions of their party. This is because all of our elected judges and justices swear to uphold and defend the Constitution, not to protect their political parties. It is neither helpful nor accurate to suggest that judges, who are elected on a non-partisan basis, will let partisan interests influence their decisions. This is particularly so where, as here, plaintiffs

acknowledge that there is no evidence of any actual bias on the part of Justice Newby or any of the other Justice of this Court.

CONCLUSION

For the foregoing reasons, the Legislative Defendants submit that plaintiffs' Motion to Recuse lacks any legal basis and that recusal is neither required nor advisable under the circumstances raised by plaintiffs. The Legislative Defendants are confident that Justice Newby and all members of this Court will decide this appeal on its merits, not on perceived partisan interests.

Respectfully submitted this 3rd day of December, 2012.

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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The undersigned hereby certifies that the foregoing Legislative Defendants' Response to Plaintiffs-Appellees' Motion for Recusal of Paul Newby has been served this day by depositing a copy thereof in a depository under the exclusive care and custody of the United States Postal Service in a first-class postage-prepaid envelope properly addressed to the following:

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EXHIBIT 1

Printed from the News & Observer - www.NewsObserver.com
Published Sun, Oct 07, 2012 12:00 AM
Modified Sun, Oct 07, 2012 04:49 AM

For the court

PUBLISHED IN: EDITORIALS

Just one of the seven seats on the North Carolina Supreme Court is up for election this year, but the race is of more than routine interest. That's because the outcome is loaded with political potential.

If incumbent Justice Paul Newby retains his seat (winning a second eight-year term) the present political-party divide on the state's highest court will remain as it is, 4 to 3 Republican. If challenger Sam Ervin IV wins, justices who identify themselves as Democrats will gain the majority.

Find out more:

Paul Newby: newbyforcourt.comSam Ervin: ervinforsupremecourt.com

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How much does that matter? For most of the cases this court hears, next to nothing. In a handful, however, political preferences – no matter how much the justices swear they judge every case solely on the facts and the law – have a way of coming to the fore.

That's particularly true of redistricting, the once-a-decade dogfight in which the major parties mangle and manipulate voting districts so that their side is likely to come out on top. Courts are often called on to make the final calls on redistricting plans. And it's the rare Supreme Court justice who, after judging such a case "solely on the merits," reaches a conclusion contrary to the party line.

That's one reason why Democrats are backing Ervin (grandson of the late Sen. Sam Ervin) and why Republicans are going all out for Newby, to the extent of setting up a super PAC to support their man with spending above and beyond the public financing that Newby (and Ervin) elected to receive. The PAC can raise and spend unlimited sums. Newby, who appears at tea party events, also gets support from Civitas Action of Raleigh.

It's all perfectly legal, but the effect is to undermine the public financing system and to inject more politics into the Supreme Court. Plus, it erodes public confidence in the judiciary – when big money gets involved, whose tune does justice dance to?

The flip side of all this is that both candidates, Ervin and Newby, are well qualified. Newby can cite the many opinions he's written and his constitutional expertise. Ervin is an effective judge on the Court of Appeals who previously served on the state Utilities Commission. Both are graduates of distinguished law schools and had extensive legal experience before they became judges. And though many of their endorsements come from predictable quarters – business and industry for Newby, labor and lawyers for Ervin – each man pledges judicial modesty and fairness to all.

For voters with strong political leanings, the candidates' party identifications may decide the issue. On that score, it's a sad fact that the Republican-dominated redistricting in effect for this year's elections was extraordinarily partisan, setting up voting districts that go way out their way to

disadvantage Democrats. An Ervin victory might eventually bring North Carolina's redistricting back toward middle ground.

Newby's side of the ledger counts endorsements from several former Supreme Court chief justices, two of whom are Democrats. Their argument, not unreasonable, is that a sitting justice who's doing a good job deserves to stay on the court. Newby takes this a step further, hinting it's unfortunate that he has to face an opponent. Yet in a system that relies on elections to fill seats on the bench – a system Republicans have championed – challengers have every right to make their case.

To us, Ervin's challenge to Newby is a credible one, and he has our editorial endorsement. He's fair, level-headed and less overtly political than the incumbent. Indications are that he would make a fine justice.

EXHIBIT 2

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ADMINISTRATION OF JUSTICE BULLETIN 2009/03 | SEPTEMBER 2009

Recusal

Michael Crowell

Disqualification and recusal of a judge is governed by Canon 3 of the Code of Judicial Conduct and, in criminal cases, by North Carolina General Statutes (hereinafter G.S.) § 15A-1223. In some exceptional circumstances the due process clause of the federal and state constitutions may be implicated as well.

Canon 3C

Section C of Canon 3 of the Code of Judicial Conduct states that a judge should recuse upon motion of a party, or on the judge's own initiative, whenever "the judge's impartiality may reasonably be questioned." The canon then lists specific instances when recusal is appropriate. The list is not intended to be exhaustive.

The specific instances in which a judge should disqualify, as identified in the canon, are:

1. The judge has a personal bias or prejudice concerning a party.
2. The judge has personal knowledge of disputed evidentiary facts.
3. While in law practice, the judge, or someone with whom the judge practiced, served as a lawyer in the matter in controversy or is a material witness about it.
4. The judge or judge's spouse or minor child has a financial interest in the matter or another interest that could be substantially affected.
5. The judge or judge's spouse, or someone within the third degree of relationship to either of them, or the spouse of such a person, is (a) a party or officer, etc., of a party, (b) a lawyer in the case, (c) known by the judge to have an interest that could be substantially affected, or (d) known by the judge to likely be a material witness.

The canon states that a judge should be informed about the judge's own financial interests and should make a reasonable effort to be informed about financial interests of the judge's spouse and minor children.

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G.S. 15A-1223

G.S. 15A-1223, applicable to all criminal proceedings, allows a judge to recuse on the judge's own motion, requires a judge to be disqualified if the judge is a witness in the case, and requires disqualification upon the motion of the state or of a defendant when a judge is:

- Prejudiced against the moving party or in favor of the other side.
- Closely related to the defendant.
- Otherwise unable to perform the duties of a judge in an impartial manner.

Constitutional Due Process

In limited circumstances a judge's failure to recuse may deny a party's constitutional right to due process. "It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" Caperton v. A.T. Massey Coal Co., No. 08-22, slip op. at 6 (U.S. June 8, 2009) (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)). It is an unusual case, however, when due process is implicated, and "only in the most extreme of cases would disqualification on this basis be constitutionally required" Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 822 (1986).

Caperton was one of those most extreme of cases. A West Virginia supreme court justice refused to recuse from an appeal concerning a dispute between coal mining companies even though the president of one of the companies had just spent several millions of dollars waging an independent campaign to have the justice elected. The justice did not recuse, and the West Virginia Supreme Court, of which he was a part, narrowly reversed a $50 million judgment against his supporter's company. The United States Supreme Court found a violation of due process in the justice's refusal to disqualify himself.

As the *Caperton* opinion emphasizes, a due process violation based on a judge's failure to recuse is unusual. For a long time the due process clause was held to require disqualification only when a judge had "a direct, personal, substantial, pecuniary interest" in a case. Tumey v. Ohio, 273 U.S. 510, 523 (1927). Disqualification because of a more remote financial interest, kinship, personal bias, or other similar circumstance was not considered a matter of constitutional due process; instead, it was left to the discretion of state policymakers. In *Tumey*, though, the defendant was held to have been denied due process when the town mayor who heard a liquor violation in his dual role as judge was paid a salary supplement from the fines he imposed. That situation gave the mayor a direct, personal financial interest in the outcome, but the Supreme Court's due process concern arose also from the mayor's motive "to convict and to graduate the fine to help the financial needs of the village." *Tumey*, 273 U.S. at 535.

Later, in *Ward v. Monroeville*, 409 U.S. 57 (1972), the court confirmed that a due process violation could occur even when the judge did not have a personal financial interest, reversing a conviction because the fines assessed by the mayor–judge went to the town coffers although the judge himself did not receive any of the money. Of course, recusal is not really the solution for the due process problems raised in *Tumey* and in *Ward*. The issue is the structure of the court itself, depending on the revenue from fines, and the solution is to not have a court in which a judge has such an interest in the outcome of a case.

In re Murchison, 349 U.S. 133 (1955), extended due process rights to require a judge to recuse in some situations in which there is no financial interest at stake. In *Murchison*, the court held that the judge should have disqualified himself from a trial for perjury and contempt when he

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had presided at a previous proceeding at which he examined the defendants and charged them with the perjury and contempt.

Likewise, in *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), a due process violation was found when a judge refused to disqualify himself from deciding criminal contempt charges against a defendant who had repeatedly insulted and cursed the judge throughout a three-week trial. An important factor in the court's decision was that the judge sentenced the defendant to eleven to twenty-two years in prison for the contempt, an indication that the judge's personal feeling may have influenced his decision.

The Supreme Court in *Caperton* stressed, repeatedly, that each of these cases was exceptional and that it was only in such extreme circumstances that due process would require a judge to recuse. The court also emphasized that it was applying an objective standard. The test is not whether a judge is actually biased; it is whether, in light of normal human tendencies and weaknesses, there would be an unacceptable risk that the average judge would be tempted "not to hold the balance nice, clear and true." Caperton v. A.T. Massey Coal Co., No. 08-22, slip op. at 15 (U.S. June 8, 2009) (quoting *Tumey*, 273 U.S. at 532).

Due process, then, can require a judge to recuse when, even though there is no evidence of actual bias by that particular judge, the circumstances are such that it is likely an average judge would be tempted to favor one side or the other. However, as discussed above, the Supreme Court stated that due process requires disqualification "only in the most extreme of cases."

The circumstances in which the due process clause thus far has been applied to require disqualification are:

1. Cases in which the judge has a direct, personal, substantial pecuniary interest in the outcome, such as in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), where a state supreme court justice had a pending lawsuit which turned on the same legal issue as the case before him on appeal;
2. Cases before a court which is structured so that the judge will be tempted to impose a fine because the judge or the judge's governmental entity benefits financially from the revenue;
3. Cases in which the judge who is trying a criminal case is responsible for bringing the charges in the first place or, when contempt is involved, otherwise has a strong personal interest in the outcome; and
4. Cases in which one party has made a financial expenditure to the judge's election campaign large enough to have likely affected the outcome of the election, knowing that the party's case would be coming before that judge.

Procedure for Raising Disqualification

For criminal cases, G.S. 15A-1223 provides that a party's motion to disqualify a judge must be submitted in writing, must have supporting affidavits, and must be filed at least five days before the trial unless there is good cause for delay. The failure to follow those rules can be the basis for denying the motion. State v. Poole, 305 N.C. 308 (1982). When the basis for disqualification is not known until after the statutory deadline for filing the motion has passed, the motion should be filed as soon as reasonably possible.

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For civil cases, neither Canon 3C nor any statute specifies when or how a party's motion to disqualify a judge should be made. Although there is no statutory deadline for a recusal motion in a civil case, a party may waive any right to object by waiting too long. Delay was a factor in denying the motion for recusal in *In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 618 S.E.2d 819 (2005), when a motion for the judge's disqualification was not filed until months after the judge's disclosure of his daughter's summer employment with the opposing law firm. In *State v. Pakulski*, 106 N.C. App. 444, 417 S.E.2d 515 (1992), one of several grounds for rejecting the defendant's appeal on recusal was that the issue had not been raised any time soon after the judge's alleged prejudicial statement ("Why don't you just plead the slimy sons-of-bitches guilty?"); indeed, the issue was only raised after the case was appealed and remanded. *Pakulski* was a criminal case, but the guiding principle would seem applicable to any case: "A defendant cannot choose to wait and seek a trial judge's recusal until after the judge rules unfavorably to the defendant on some other grounds." 106 N.C. App. at 450.

Disclosure and Waiver of Disqualification

Canon 3C allows a judge to disclose a potential reason for disqualification and then continue to hear the matter if the parties and lawyers all agree in writing that the potential reason for disqualification is immaterial or insubstantial. The judge's disclosure and the parties' agreement must be placed in the record.

Who Decides Recusal Motion

The first question facing a judge who has received a recusal motion is whether to hear the motion oneself or refer it to another judge. If the allegations made about the judge's bias or other potential disqualification are made with sufficient support to require findings of fact, the motion to recuse should be referred to another judge. Ponder v. Davis, 233 N.C. 699, 65 S.E.2d 356 (1951). The judge whose impartiality is being questioned then may respond by affidavit or testimony to rebut the allegations.

> We are, however, constrained to observe that when the trial judge found sufficient force in the allegations contained in defendant's motion to proceed to find facts, he should have either disqualified himself or referred the matter to another judge before whom he could have filed affidavits in reply or sought permission to give oral testimony. Obviously it was not proper for this trial judge to find fact so as to rule on his own qualification to preside when the record contained no evidence to support his findings. Bank v. Gillespie, 291 N.C. 303, 311 , 230 S.E.2d 375, 380 (1976) (citing Ponder v. Davis).

In *Ponder*, the court was hearing an election dispute, and the defendants moved to disqualify the judge because he had campaigned for the other candidate. The judge called the motion "scurrilous and untrue" and ordered it stricken from the record. The North Carolina Supreme Court held that he should have referred the motion to recuse to another judge.

In *Bank v. Gillespie*, the defendant Gillespie sought to disqualify the judge on three fronts:

1. There had been an unfriendly termination of the judge's representation of the Gillespie family when the judge was in private practice.

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2. The judge had prosecuted Gillespie when the judge was a prosecutor.
3. The judge had money in the plaintiff bank at the time of the trial.

As in *Ponder*, the Supreme Court stated that because the judge's denial of the defendant's motion for disqualification required findings of fact, the judge should have referred the motion to another judge.

If a party's motion to recuse is not supported by sufficient evidence to require findings of fact, or if the allegations would not require recusal even if true, a judge need not refer the recusal motion to another judge. Another way to look at the question is that if the decision on the motion to recuse does not require the judge to offer evidence then it need not be referred to another judge. Cases that demonstrate this include:

State v. Poole
305 N.C. 308, 289 S.E.2d 335 (1982)
The motion for recusal did not have to be referred to another judge in this criminal case when, right after the judge denied the defendant's motion to substitute counsel, the defendant moved for recusal. He said that the judge was biased because the judge had made remarks against the defendant outside of the defendant's presence. The judge said he had made no such remarks, then denied the motion. There was no need to refer the disqualification issue to another judge because the defendant had produced no evidence to support his allegation: The record showed no remarks made by the judge about the defendant outside of his presence, and the judge had stated he made no such remarks. Circumstances also indicated the recusal motion was the defendant's hasty response to the denial of his motion to substitute counsel.

State v. Scott
343 N.C. 313, 471 S.E.2d 605 (1996)
No referral to another judge was required when the criminal defendant offered no evidence to support his claim of bias based on the fact that the judge's son worked in the district attorney's office and on the judge's comments in an earlier trial about the credibility of one of defendant's witnesses. Simply being familiar with a case or witnesses from earlier proceedings is not grounds for disqualification, and the defendant had not offered any evidence to support his contention that the judge's experience or his son's employment biased him against the defendant.

Actual versus Perceived Partiality

Canon 3C states that a judge should recuse when "the judge's impartiality may reasonably be questioned." Case law states a judge should be disqualified when "a reasonable man knowing all the circumstances would have doubts about the judge's ability to rule . . . in an impartial manner." McClendon v. Clinard, 38 N.C. App. 353, 356, 247 S.E.2d 783, 785 (1978). In *State v. Fie*, 320 N.C. 626, 628, 359 S.E.2d 774, 776 (1987), the supreme court stated that a judge should recuse in a criminal case not only when the disqualifications in G.S. 15A-1223 exist but whenever the judge's "objectivity may reasonably be questioned." In that case, the court held that the trial judge should have recused because "a perception could be created in the mind of a reasonable person that [the judge] thought the defendants were guilty of the crimes . . . and that it would be difficult for the defendants to receive a fair and impartial trial" Does that mean a

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judge should recuse whenever there might be an appearance of partiality? The answer appears to be no, because of a 2003 revision to the Code of Judicial Conduct and a subsequent North Carolina Supreme Court decision.

In April 2003 the state supreme court amended the Code of Judicial Conduct to eliminate the phrase "appearance of impropriety" from the canons. Before the 2003 amendment Canon 2 stated, as does the Model Code of Judicial Conduct promulgated by the American Bar Association and used by most states, "A judge should avoid impropriety and the appearance of impropriety in all his activities." As rewritten, North Carolina's Canon 2 says only, "A judge should avoid impropriety in all his activities." Canon 3C still states that a judge should disqualify in any proceeding "in which the judge's impartiality may reasonably be questioned," but the elimination of the "appearance of impropriety" language from Canon 2 seems to be a better barometer of the North Carolina Supreme Court's current view of recusal.

Following the April 2003 revision of Canon 2, the court in December 2003 decided *Lange v. Lange*, 357 N.C. 645, 588 S.E.2d 877 (2003). In *Lange*, the plaintiff's motion to disqualify a district judge was referred to a second judge. The second judge found that there was no violation of the Code of Judicial Conduct but decided that the first judge still should recuse because the relationship at issue "would cause a reasonable person to question whether [the judge] could rule impartially." The North Carolina Supreme Court held that conclusion was wrong. Emphasizing that "the burden is upon the party moving for disqualification to demonstrate objectively that grounds for disqualification actually exist," and that such showing "must consist of substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially," the supreme court said that the judge should not be disqualified if there was no actual violation of the Code of Judicial Conduct. "Thus, the standard is whether 'grounds for disqualification actually exist.'" *Id.* 357 N.C. at 649 (quoting State v. Scott, 343 N.C. at 325). Another way of saying it, perhaps, is that if there is no actual evidence of bias then a reasonable person would not question the judge's ability to rule impartially.

The *Lange* opinion does not discuss the revision of Canon 2. Still, when the two are considered together, it seems less likely now than before that a judge would be expected to recuse if there is an appearance of partiality but no evidence of an actual personal bias, prejudice, or interest.

As discussed above, however—just to complicate matters—when a claim is made that constitutional due process requires a judge to step down from a case, the test is not whether actual bias exists, it is whether the circumstances are such that, given normal human tendencies and weaknesses, the average judge would be tempted to favor one side or the other. "Due process 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.'" Caperton v. A.T. Massey Coal Co., No. 08-22, slip op. at 16 (U.S. June 8, 2009) (quoting *In re* Murchison, 349 U.S. at 136

Meaning of Bias or Prejudice

Disqualification of a judge requires a showing of personal bias or prejudice against or in favor of one side. Dunn v. Canoy, 180 N.C. App. 30, 636 S.E.2d 243 (2006); State v. Vega, 40 N.C. App. 326, 253 S.E.2d 94 (1979); Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 374 (1977); *In re* Paul, 28 N.C. App. 610, 222 S.E.2d 479 (1976). Generalized allegations forecasting a likely prejudice based on the history of the case, a judge's prior involvement with the parties, a judge's general view of

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the law, or similar considerations are not sufficient to necessitate recusal. "The bias, prejudice or interest which requires a trial judge to be recused from a trial has a reference to the *personal disposition or mental attitude of the trial judge,* either favorable or unfavorable, toward a party to the action before him." State v. Scott, 343 N.C. at 325 (emphasis added). The cases discussed below include numerous examples in which the allegations were not considered sufficient to show a personal bias or prejudice directed toward the party seeking the judge's disqualification.

Disqualification Based on Party Ties

As would seem self-evident, a judge is disqualified from hearing a case when one of the parties has a pending lawsuit against the judge. *In re* Braswell, 358 N.C. 721, 600 S.E.2d 849 (2004). Likewise, a judge may not preside at a session of court in which a traffic charge against the judge is on the docket. *In re* Martin, 302 N.C. 299, 275 S.E.2d 412 (1981). In both of those examples the judge was sanctioned by the North Carolina Supreme Court.

No Disqualification for Prior Involvement with Case

In a number of cases, the appellate courts have stated that a judge is not disqualified from hearing a case just because the judge is aware of evidentiary facts from a previous involvement with the case or because the judge ruled against one of the parties in an earlier phase of the case. Some of the cases explicitly state the value of judicial efficiency in having the same judge preside over subsequent hearings in the same case. Cases addressing a judge's previous involvement with a matter include:

> Love v. Pressley
> 34 N.C. App. 503, 239 S.E.2d 574 (1977)
> The judge was not disqualified from hearing a landlord–tenant dispute when the judge had ruled against the defendant in an earlier case involving similar allegations. The entry of findings of fact adverse to the defendant in the previous case was not evidence of a personal bias or prejudice.
>
> *In re* Faircloth
> 153 N.C. App. 565, 571 S.E.2d 65 (2002)
> The judge was not disqualified from hearing an action for termination of parental rights against the defendant although the judge presided at an earlier trial in which the defendant was found guilty of abuse and neglect. Knowledge of evidentiary facts obtained in an earlier proceeding is not grounds for disqualification.
>
> State v. Vega
> 40 N.C. App. 326, 253 S.E.2d 94 (1979)
> The judge was not disqualified on the ground that he presided at an earlier murder trial for the defendant at which the judge had to declare a mistrial when the victim's mother made an emotional outburst. Although the mistrial was declared because the

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outburst might have unduly influenced jurors, there was no evidence that the judge was influenced or was biased against the defendant.

Savani v. Savani
102 N.C. App. 496, 403 S.E.2d 900 (1991)
The judge was not disqualified from hearing a child support case against the defendant even though the judge had earlier ordered transfer of child custody from the defendant to the plaintiff.

State v. McRae
163 N.C. App. 359, 594 S.E.2d 71 (2004)
The judge was not disqualified from presiding over a competency hearing for a defendant in this murder case even though the judge had presided at a previous trial at which the defendant was convicted. That conviction was reversed on appeal because the judge improperly failed to provide to the defendant a competency hearing on the day of trial. The same judge hearing the matter again serves judicial efficiency. There was no showing of personal bias.

State v. Moffitt
185 N.C. App. 308, 648 S.E.2d 272 (2007)
The judge was not disqualified to preside over the resentencing of the defendant after appeal even though the judge was aware of the plea bargain the defendant had rejected at the original trial. Bias or prejudice, as stated above, refers to the personal disposition or mental attitude of the judge toward the party.

State v. Monserrate
125 N.C. App. 22, 479 S.E.2d 494 (1997)
The judge who issued a search warrant was not disqualified to hear a motion to suppress the evidence, but the better practice is for another judge to hear the suppression motion. When issuing a search warrant, a judge is not vouching for the veracity of the affidavit supporting the warrant; the judge is only deciding that the information in the affidavit is sufficient to establish probable cause the informant is telling the truth.

In re LaRue
113 N.C. App. 807, 440 S.E.2d 301 (1994)
The judge was not disqualified from hearing an action for termination of parental rights based on the parents' mental disability, even though the judge had presided over an earlier custody proceeding, had decided that the department of social services should retain custody of the child, and had recommended that social services proceed to termination. The knowledge of evidentiary facts from the previous hearing did not disqualify the judge. The judge's recommendation about proceeding with termination did not demonstrate disqualifying bias because the judge was required by statute to evaluate as part of the custody proceeding whether termination of parental rights should be considered.

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Recusal in Contempt Cases

Cases of direct criminal contempt—willful behavior occurring in the court's presence that interrupts the proceedings or impairs the respect due to the court—can present situations in which it is difficult for a judge to remain impartial. If the contempt arises from personal insults spoken to the judge, perhaps containing foul language, it will be a challenge for the judge to not feel a personal repulsion. For that reason, G.S. 5A-15(a), the statute on plenary proceedings for criminal contempt (i.e., when the contempt is not dealt with summarily by the judge but is the subject of a separate hearing following issuance of a show cause order) states, "If the criminal contempt is based upon acts before a judge which so involve him that his objectivity may reasonably be questioned, the order must be returned before a different judge." Although the statute does not cover summary proceedings for direct criminal contempt, the same principles should apply. When the events leading up to the summary proceeding show an ongoing conflict between a judge and a defendant that would make it difficult for the judge to put personal feelings aside, the judge should consider recusal.

The provision on recusal in the contempt statute tracks case law on the issue.

> Due process standards require that where the trial judge is so embroiled in a controversy with the defendant that there is a likelihood of bias or an appearance of bias, the judge may be 'unable to hold the balance between vindicating the interests of the court and the interests of the accused,' and should recuse himself from the proceedings. *In re* Nakell, 104 N.C. App. 638, 647, 411 S.E.2d 159, 164 (1991), *disc. review denied*, 330 N.C. 851 (1992) (quoting *In re* Paul, 28 N.C. App. at 618).

In *Nakell*, Judge Lake, who later became a justice and the chief justice, refused to disqualify himself. His decision was upheld on appeal when the trial transcript showed that his responses to the lawyer's persistent interruptions were calm, deliberate, and unemotional. Lake's findings of fact for the contempt likewise demonstrated a professional objectivity. Also, in stark contrast to *Mayberry v. Pennsylvania*, discussed above in the section on constitutional due process, the contempt in *Nakell* was punished by only a $500 fine and ten days' imprisonment, not by an unusually severe sentence like the sentence of eleven to twenty-two years in *Mayberry*.

The United States Supreme Court's recent decision in *Caperton v. A.T. Massey Coal Co.*, No. 08-22, slip op. at 6 (U.S. June 8, 2009), affects the analysis for contempt cases like *Nakell*. The standard for constitutional due process articulated in *Caperton* is not whether a judge should recuse because of actual bias but whether, given normal human tendencies and weaknesses, the average judge would be tempted to favor one side. Thus, even an exemplary judge, when faced with a belligerent defendant, should consider recusal if the direct criminal contempt is so abusive that the average judge would find it difficult to rule in a disinterested way.

Judge Not Disqualified for Efforts to Settle Case

A judge's efforts to get parties to settle a case, even if accompanied by some expression of dissatisfaction at the parties, does not establish a disqualification by itself. Examples of such cases include:

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Dunn v. Canoy
180 N.C. App. 30, 636 S.E.2d 243 (2006)
The judge's efforts to persuade the parties to settle in this case was not a basis for disqualification, even when the judge became angry at the failure to settle. For disqualification, there still needs to be a showing of personal bias or prejudice.

State v. Kantsiklis
94 N.C. App. 250, 380 S.E.2d 400 (1989)
The judge was not disqualified from presiding over this criminal trial when the judge expressed anger in chambers about the failure to reach a plea agreement. The judge was expressing frustration at the way in which the jury's time was being wasted while the negotiations dragged on. The incident may have demonstrated impatience but not personal bias or prejudice.

In re Pedestrian Walkway Failure
173 N.C. App. 237, 618 S.E.2d 819 (2005)
The judge's efforts to get the parties to settle this negligence case did not disqualify him from presiding over further proceedings in the case.

Judge Not Disqualified for Views on Law

In *State v. Kennedy*, 110 N.C. App. 302, 429 S.E.2d 449 (1993), the judge was not disqualified from hearing a drunk driving case because the judge's wife had been injured in an accident caused by a drunk driver. The fact that a judge may view one kind of crime as more serious than another is not a basis for disqualification. In this case, no evidence was presented of a personal bias toward the defendant.

Resident Judge Not Disqualified from Case in Which County Is a Party

Case law from *County of Johnston v. City of Wilson*, 136 N.C. App. 775, 525 S.E.2d 826 (2000) directs that a resident superior court judge should not be disqualified from hearing a condemnation case just because the judge's home county is the defendant. The plaintiff suing the county in this case did not provide an affidavit or offer other evidence to support a claim of personal bias.

Senior Resident Not Disqualified to Hear Magistrate Removal

The senior resident superior court judge in *In re* Ezzell, 113 N.C. App. 388, 438 S.E.2d 482 (1994), was not disqualified to hear a removal proceeding for a magistrate even though the judge appointed the magistrate. The magistrate did not offer evidence of personal bias or prejudice.

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Judge's Relationship with Lawyers

Canon 3C includes clear rules on a judge's recusal because of a family relationship with a lawyer in the case or previous ties to one of the lawyers while in practice. The case law, therefore, tends to deal with more remote relationships. Examples include:

Lange v. Lange
357 N.C. 645, 588 S.E.2d 877 (2003)
The judge's joint ownership of mountain vacation property with several others, one of whom was one of the parties' lawyer, was not sufficient basis for disqualification in the absence of any other evidence of bias or prejudice.

In re Pedestrian Walkway Failure
173 N.C. App. 237, 618 S.E.2d 819 (2005)
The judge was not disqualified by the fact that his daughter, a law student, had a summer clerkship with one of the firms in the case. The daughter was working in a separate part of a large firm; she had no involvement in the case; and when the judge had informed the lawyers in the case about the summer job offer, none had objected.

Savani v. Savani
102 N.C. App. 496, 403 S.E.2d 900 (1991)
The judge was not disqualified from hearing a child support case because of an office-sharing arrangement with one of the parties' lawyers when the judge was in private practice. The lawyer in question did not enter the case until after the earlier custody hearing in which the judge had transferred custody of the child and found the child in need of support.

Judge Must Recuse, Not Bar Lawyer

A judge cannot avoid a disqualification by barring a lawyer from cases heard by the judge. In *In re* Bissell, 333 N.C. 766, 429 S.E.2d 731 (1993), it was improper for a judge to bar a lawyer from sessions of court in which she was presiding because the lawyer had initiated an ethics investigation of her. The effect was to hamper the lawyer's practice. The judge should have recused herself, not put the burden on the lawyer to avoid her.

Judge Disqualified for Expressing Opinion about Case

A judge should recuse when the judge previously has expressed, directly or indirectly, an opinion as to the merits of the case, casting doubt on the ability to be impartial. To disqualify a judge the expression must have been such as to indicate that the judge already had formed a firm opinion about the outcome. Some cases that demonstrate this include:

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State v. Hill
45 N.C. App. 136, 263 S.E.2d 14 (1980)
The judge should have disqualified himself from this criminal fraud trial when he had heard the defendant testify in an earlier trial of another defendant; had stated after the testimony that the defendant had implicated himself; and had, on his own motion, raised the defendant's bond.

In re Dale
37 N.C. App. 680, 247 S.E.2d 246 (1978)
The judge should have disqualified himself from hearing a disciplinary matter against a lawyer when the judge sent a notice of hearing stating in conclusory language that "you negligently failed to" The use of such language would have created an impression that the judge already had decided the matter.

State v. Fie
320 N.C. 626, 359 S.E.2d 774 (1987)
The judge should have disqualified himself from defendants' breaking-and-entering trial where he had written to the district attorney to request that the grand jury consider charges against them based on testimony he had heard in another trial. The judge's letter demonstrated his disbelief of witnesses that were likely to be called again in defendants' trial.

McClendon v. Clinard
38 N.C. App. 353, 247 S.E.2d 783 (1978)
The plaintiffs' lawsuit was dismissed when plaintiffs and their counsel failed to appear in court. When plaintiffs moved to set aside the judgment, the judge should have disqualified himself because he had reported the plaintiff's lawyer to the local bar for contact with a member of the jury venire and then had notified a newspaper reporter of the incident and given an interview about it. The judge was properly concerned about the lawyer's contact with the jury venire member, but his subsequent discussions with the press raised questions about his impartiality.

In re LaRue
113 N.C. App. 807, 440 S.E.2d 301 (1994)
The judge was *not* disqualified from hearing an action for termination of parental rights based on the parents' mental disability, even though the judge had presided over an earlier custody proceeding and recommended that social services proceed to termination. The recommendation did not show bias or prejudice against the parents because the judge was required by statute as part of the custody proceeding to evaluate whether termination of parental rights should be considered.

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Recusal Related to Election

On March 13, 1998, Judge John B. Lewis Jr., the chair of the Judicial Standards Commission at the time, issued a memorandum expressing the commission view on recusal related to elections. The memo states that a judge should recuse from any trial or appellate proceeding in which the opponent, the opponent's campaign manager or treasurer, or the judge's campaign manager or treasurer appears. For a nontrial proceeding at which one of those individuals appears, the judge should disclose the basis for disqualification and recuse unless the parties and lawyer sign a waiver. If another member of the law firm appears rather than one of the named individuals, the judge need not recuse unless the law firm's appearance would bias or prejudice the judge.

The effect of election support or opposition on recusal was the subject of the United States Supreme Court's June 2009 decision in *Caperton v. A.T. Massey Coal Co.*, discussed above. The court in *Caperton*, emphasizing the unusual and extreme circumstances of the case, found a denial of due process when a state appellate judge failed to disqualify himself from a case involving someone who had bankrolled a $3 million independent campaign for the judge's election. The court said that the factors which should be taken into account in deciding whether campaign financial support requires a judge to disqualify are "the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election." No. 08-22, slip op. at 14 (U.S. June 8, 2009). "The temporal relationship between the campaign contributions, the justice's election, and the pendency of the case is also critical." No. 08-22, slip op. at 15 (U.S. June 8, 2009).

In *Caperton*, the litigant made only a $1,000 contribution to the judge's campaign committee; the $3 million went to an independent campaign waged outside the judge's control. In considering recusal, thus, it is important to take into account not only direct campaign contributions but other support as well. If the expenditures for or against a judge are out of balance with other contributions, it is known or seems likely at the time of the campaign that the case will come before the judge, and the expenditures are large enough to have made a difference in the outcome, the judge should recuse. The test in this situation is not whether the expenditures create actual bias in the judge but whether, given that level of political support and normal human tendencies and weaknesses, the average judge would be tempted to tip the scales of justice toward one side.

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EXHIBIT 3

24-Hour Notice of Disbursements for Electioneering Communications

Amendment ☐ Yes ☒ No

1. Reporting Entity Information

a. Full Name of Entity Making Disbursement	c. Type *(Check one)*	d. Federal ID Number
FAIRJUDGES.NET	☐ Individual ☐ Other Organization ☒ Nonprofit Organization	20-5204162
b. Mailing Address (include City, State and Zip Code) and Phone Number	**e. Employer's Name or Principal Place of Business**	
2839 BARMETTLER ST RALEIGH, NC 27607		
	f. Occupation	

2. Period Covered Start 9-6-06 End 10-31-06

3. Were the disbursements for the electioneering communication made exclusively from donations to a segregated bank account? Yes ☒ No ☐

4. Custodian of Books

a. Full Name of Entity Making Disbursement	
SCOTT FALMLEN	
b. Mailing Address (include City, State and Zip Code) and Phone Number	**c. Employer's Name or Principal Place of Business**
2839 BARMETTLER ST RALEIGH, NC 27607 919-832-2666	SELF
	d. Occupation
	CONSULTANT

5. Total Contributions ALL Pages	$ 207,275.00
6. Total Expenditures ALL Pages	$ 204,225.00

CERTIFICATION

I certify that this entity is in full compliance with Article 22E and Article 22F. I further certify that this statement is complete, true and correct.

SCOTT R FALMLEN — Printed Name of Signer

Signature

10-30-06 — Date

RECEIVED
OCT 31 2006
CAMPAIGN REPORTING

Receipts for Electioneering Communications

1. Receipt Information

a. Item Num	b. Full Name, Mailing Address & Phone (include city, state, and zip)	c. Date (mm/dd/yyyy)	d. Amount
1	DANNY R GLOVER 208 RACHEL DR ELIZABETH CITY, NC 27909	9-6-06	$ 1,000.00
2	CRANDALL CLOSE BOWLES 6725 OLD PROVIDENCE RD CHARLOTTE, NC 28226	10-6-06	$ 2,000.00
3	CAMERON M HARRIS P.O. BOX 220748 CHARLOTTE, NC 28222	10-13-06	$ 5,000.00
4	NORTH CAROLINA DEMOCRATIC PARTY - FEDERAL ACCOUNT 220 HILLSBOROUGH ST RALEIGH, NC 27603	10-13-06	$ 50,000.00
5	CAREY DEAN DEBNAM 1410 PARK DR. RALEIGH, NC 27605	10-19-06	$ 10,000.00
6	MARGARET ABRAMS 5101 HUNTINGWOOD DR. RALEIGH, NC 27606	10-25-06	$ 10,000.00
2. Total Receipts THIS Page *(sum all the 'Id' entries on this page)*			$ 78,000.00
3. Total Receipts ALL Pages *(sum all the 'Id' entries on all receipt pages)*			$

Receipts for Electioneering Communications

1. Receipt Information

a. Item Num	b. Full Name, Mailing Address & Phone (include city, state, and zip)	c. Date (mm/dd/yyyy)	d. Amount
7	WADE E. BYRD P.O. DRAWER 2797 FAYETTEVILLE, NC 28302	10-26-06	$ 10,000.00
8	CARMEN HOOKER ODOM 510 GLENWOOD AVE RALEIGH, NC 27603	10-26-06	$ 1,000.00
9	NORTH CAROLINA DEMOCRATIC PARTY - FEDERAL ACCOUNT 220 HILLSBOROUGH ST. RALEIGH, NC 27603	10-27-06	$ 25,000.00
10	ROBERT PAGE 105 WILLOUGHBY BLVD GREENSBORO, NC 27408	10-27-06	$ 5,000.00
11	PRICE FOR CONGRESS P.O. BOX 1986 RALEIGH, NC 27602	10-30-06	$ 10,000.00
12	CLARICE CATO GOODYEAR 322 RED BARN TR. MATTHEWS, NC 28104	10-30-06	$ 1,000.00
2. Total Receipts THIS Page *(sum all the 'Id' entries on this page)*			$ 52,000.00
3. Total Receipts ALL Pages *(sum all the 'Id' entries on all receipt pages)*			$

Receipts for Electioneering Communications

1. Receipt Information

a. Item Num	b. Full Name, Mailing Address & Phone (include city, state, and zip)	c. Date (mm/dd/yyyy)	d. Amount
13	DRIVE COMMITTEE 25 LOUISIANA AVE, NW WASHINGTON, DC 20001	10-25-06	$ 10,000.00
14	NORTH CAROLINA ACADEMY OF TRIAL LAWYERS PAC P.O. BOX 10918 RALEIGH, NC 27605	9-6-06	$ 11,900.00
15	NORTH CAROLINA ACADEMY OF TRIAL LAWYERS PAC P.O. BOX 10918 RALEIGH, NC 27605	10-26-06	$ 54,375.00
16	BARBARA K. ALLEN 3714 MARSH CREEK RD RALEIGH, NC 27604	10-30-06	$ 1,000.00
			$
			$

2. Total Receipts THIS Page	*(sum all the '1d' entries on this page)*	$ 77,275.00
3. Total Receipts ALL Pages	*(sum all the '1d' entries on all receipt pages)*	$ 207,275.00

Disbursements for Electioneering Communications

1. Disbursement Information

a. Item Num	b. Disbursement Date (mm/dd/yyyy)	c. Communication Date (mm/dd/yyyy)	d. Purpose (including title(s) of communication(s))
1	10-25-06	10-31-06 — 11-6-06	TV ADVERTISING (FAIRNESS)

e. Full Name, Mailing Address (include city, state, and zip) & Phone	f. Amount
TIM McKAY CONSULTING 1814 CARRINGTON DR. RALEIGH, NC 27615	$ 80,000.00

Candidate Full Name	Office Sought	Disbursement For:
SARAH PARKER	☐ House ☐ Senate District: ☐ Council of State (specify): CHIEF JUSTICE	☐ Primary ☒ General ☐ Other (specify):
MARK MARTIN PATRICIA TIMMONS-GOODSON	☐ House ☐ Senate District: ☐ Council of State (specify): ASSO. JUSTICE	☐ Primary ☒ General ☐ Other (specify):
ROBIN HUDSON	☐ House ☐ Senate District: ☐ Council of State (specify): ASSO. JUSTICE	☐ Primary ☒ General ☐ Other (specify):

a. Item Num	b. Disbursement Date (mm/dd/yyyy)	c. Communication Date (mm/dd/yyyy)	d. Purpose (including title(s) of communication(s))
2	10-26-06	10-31-06 — 11-6-06	TV ADVERTISING (FAIRNESS)

e. Full Name, Mailing Address (include city, state, and zip) & Phone	f. Amount
TIM McKAY CONSULTING 1814 CARRINGTON DR RALEIGH, NC 27615	$ 6,250.00

Candidate Full Name	Office Sought	Disbursement For:
SARAH PARKER	☐ House ☐ Senate District: ☐ Council of State (specify): CHIEF JUSTICE	☐ Primary ☒ General ☐ Other (specify):
MARK MARTIN PATRICIA TIMMONS-GOODSON	☐ House ☐ Senate District: ☐ Council of State (specify): ASSO. JUSTICE	☐ Primary ☒ General ☐ Other (specify):
ROBIN HUDSON	☐ House ☐ Senate District: ☐ Council of State (specify): ASSO. JUSTICE	☐ Primary ☒ General ☐ Other (specify):

2. Total Disbursements THIS Page	*(sum all the 'If' entries on this page)*	$ 86,250.00
3. Total Disbursements ALL Pages	*(sum all the 'If' entries on all disbursement pages)*	$

Disbursements for Electioneering Communications

1. Disbursement Information

a. Item Num	b. Disbursement Date (mm/dd/yyyy)	c. Communication Date (mm/dd/yyyy)	d. Purpose (including title(s) of communication(s))
3	10-27-06	10-31-06 — 11-6-06	TV ADVERTISING (FAIRNESS)

e. Full Name, Mailing Address (include city, state, and zip) & Phone	f. Amount
TIM MCKAY CONSULTING 1814 CARRINGTON DR RALEIGH, NC 27615	$ 60,000.00

Candidate Full Name	Office Sought	Disbursement For:
SARAH PARKER	☐ House ☐ Senate District: ☐ Council of State (specify): CHIEF JUSTICE	☐ Primary ☒ General ☐ Other (specify):
MARK MARTIN	☐ House ☐ Senate District: ☐ Council of State (specify): ASSO JUSTICE	☐ Primary ☒ General ☐ Other (specify):
PATRICIA TIMMONS-GOODSON ROBIN HUDSON	☐ House ☐ Senate District: ☐ Council of State (specify): ASSO JUSTICE	☐ Primary ☒ General ☐ Other (specify):

a. Item Num	b. Disbursement Date (mm/dd/yyyy)	c. Communication Date (mm/dd/yyyy)	d. Purpose (including title(s) of communication(s))
4	10-31-06	10-31-06 — 11-6-06	TV ADVERTISING (FAIRNESS)

e. Full Name, Mailing Address (include city, state, and zip) & Phone	f. Amount
TIM MCKAY CONSULTING 1814 CARRINGTON DR RALEIGH, NC 27615	$ 22,845.00

Candidate Full Name	Office Sought	Disbursement For:
SARAH PARKER	☐ House ☐ Senate District: ☐ Council of State (specify): CHIEF JUSTICE	☐ Primary ☒ General ☐ Other (specify):
MARK MARTIN	☐ House ☐ Senate District: ☐ Council of State (specify): ASSO JUSTICE	☐ Primary ☒ General ☐ Other (specify):
PATRICIA TIMMONS-GOODSON ROBIN HUDSON	☐ House ☐ Senate District: ☐ Council of State (specify): ASSO JUSTICE	☐ Primary ☒ General ☐ Other (specify):

2. Total Disbursements THIS Page	*(sum all the '1f' entries on this page)*	$ 82,845.00
3. Total Disbursements ALL Pages	*(sum all the '1f' entries on all disbursement pages)*	$

Disbursements for Electioneering Communications

1. Disbursement Information

a. Item Num	b. Disbursement Date (mm/dd/yyyy)	c. Communication Date (mm/dd/yyyy)	d. Purpose (including title(s) of communication(s))
5	10-27-06		TV - TIME BUY CONSULTING

e. Full Name, Mailing Address (include city, state, and zip) & Phone	f. Amount
TIM MCKAY CONSULTING 1814 CARRINGTON DR RALEIGH, NC 27615	$ 29,840.00

Candidate Full Name	Office Sought	Disbursement For:
SARAH PARKER	☐ House ☐ Senate District: ☐ Council of State (specify): CHIEF JUSTICE	☐ Primary ☒ General ☐ Other (specify):
MARK MARTIN	☐ House ☐ Senate District: ☐ Council of State (specify): ASSO. JUSTICE	☐ Primary ☒ General ☐ Other (specify):
PATRICIA TIMMONS-GOODSON ROBIN HUDSON	☐ House ☐ Senate District: ☐ Council of State (specify): ASSO. JUSTICE	☐ Primary ☒ General ☐ Other (specify):

a. Item Num	b. Disbursement Date (mm/dd/yyyy)	c. Communication Date (mm/dd/yyyy)	d. Purpose (including title(s) of communication(s))
6	10-27-06		TV - PRODUCTION

e. Full Name, Mailing Address (include city, state, and zip) & Phone	f. Amount
TIM MCKAY CONSULTING 1814 CARRINGTON DR RALEIGH, NC 27615	$ 5,290.00

Candidate Full Name	Office Sought	Disbursement For:
SARAH PARKER	☐ House ☐ Senate District: ☐ Council of State (specify): CHIEF JUSTICE	☐ Primary ☒ General ☐ Other (specify):
MARK MARTIN	☐ House ☐ Senate District: ☐ Council of State (specify): ASSO. JUSTICE	☐ Primary ☒ General ☐ Other (specify):
PATRICIA TIMMONS-GOODSON ROBIN HUDSON	☐ House ☐ Senate District: ☐ Council of State (specify): ASSO. JUSTICE	☐ Primary ☒ General ☐ Other (specify):

2. Total Disbursements THIS Page	*(sum all the 'If' entries on this page)*	$ 35,130.00
3. Total Disbursements ALL Pages	*(sum all the 'If' entries on all disbursement pages)*	$ 204,225.00

VIA FAX
3 PAGES TOTAL

NOV 04 2006 08:41

11/04/2006 08:37 FAX 9198561132

24-Hour Notice of Disbursements for Electioneering Communications

Amendment ☐ Yes ☒ No

1. Reporting Entity Information

a. Full Name of Entity Making Disbursement	c. Type *(Check one)*	d. Federal ID Number
FAIRJUDGES.NET	☐ Individual ☐ Other Organization ☒ Nonprofit Organization	20-5204162
b. Mailing Address (include City, State and Zip Code) and Phone Number	e. Employer's Name or Principal Place of Business	
2839 BARNSTABLE ST RALEIGH, NC 27607		
	f. Occupation	

2. Period Covered Start 10-31-06 * End 11-3-06

3. Were the disbursements for the electioneering communication made exclusively from donations to a segregated bank account? Yes ☒ No ☐

4. Custodian of Books

a. Full Name of Entity Making Disbursement	
SCOTT FALMLEN	
b. Mailing Address (include City, State and Zip Code) and Phone Number	c. Employer's Name or Principal Place of Business
2839 BARNSTABLE ST RALEIGH, NC 27607	SELF
	d. Occupation
	CONSULTANT

5. Total Contributions ALL Pages	$ 36,000.00
6. Total Expenditures ALL Pages	$ 54,876.00

CERTIFICATION

I certify that this entity is in full compliance with Article 22E and Article 22F. I further certify that this statement is complete, true and correct.

Printed Name of Signer	Signature	Date
SCOTT R FALMLEN		11-3-06

CRO-2310 NC State Board of Elections September 2004

* REFLECTING TRANSACTIONS AFTER THE LAST REPORT WAS FILED WITH THE SBOE.

9198561132 PAGE.02

002

NOV 04 2006 08:41 9198561132 PAGE.03

11/04/2006 08:38 FAX 9198561132 003

Receipts for Electioneering Communications

1. Receipt Information

a. Item Num	b. Full Name, Mailing Address & Phone (include city, state, and zip)	c. Date (mm/dd/yyyy)	d. Amount
1	SEIU COPE 1313 L STREET NW WASHINGTON, DC 20005	10-31-06	$ 25,000.00
2	CHARLES M. FULENWIDER 410 W. UNION ST. MORGANTON, NC 28680	10-31-06	$ 5,000.00
3	KENNETH EUDY 319 JONES ST RALEIGH, NC 27601	11-1-06	$ 1,000.00
4	MIKE MCINTYRE FOR CONGRESS 3780 BERKLEY LN. LUMBERTON, NC 28360	11-3-06	$ 5,000.00
			$
			$

2. Total Receipts THIS Page	*(sum all the 'Id' entries on this page)*	$ 36,000.00
3. Total Receipts ALL Pages	*(sum all the 'Id' entries on all receipt pages)*	$ 36,000.00

NOV 04 2006 08:41 9198561132 PAGE.04

11/04/2006 08:38 FAX 9198561132 004

Disbursements for Electioneering Communications

I. Disbursement Information

a. Item Num	b. Disbursement Date (mm/dd/yyyy)	c. Communication Date (mm/dd/yyyy)	d. Purpose (including title(s) of communication(s))
1	11-2-06	11-3-06 — 11-7-06	TV ADVERTISING (AWARENESS)

e. Full Name, Mailing Address (include city, state, and zip) & Phone

TIM MCKAY CONSULTING
1814 CARRINGTON DR
RALEIGH, NC 27615

f. Amount: $ 46,645.00

Candidate Full Name	Office Sought	Disbursement For:
SARAH PARKER	☐ House ☐ Senate District: ☐ Council of State (specify): CHIEF JUSTICE	☐ Primary ☒ General ☐ Other (specify):
MARK MARTIN	☐ House ☐ Senate District: ☐ Council of State (specify): ASSO JUSTICE	☐ Primary ☒ General ☐ Other (specify):
PATRICIA TIMMONS-GOODSON ROBIN HUDSON	☐ House ☐ Senate District: ☐ Council of State (specify): ASSO JUSTICE	☐ Primary ☒ General ☐ Other (specify):

a. Item Num	b. Disbursement Date (mm/dd/yyyy)	c. Communication Date (mm/dd/yyyy)	d. Purpose (including title(s) of communication(s))
2	11-2-06		TV - TIME BUY CONSULTING

e. Full Name, Mailing Address (include city, state, and zip) & Phone

TIM MCKAY CONSULTING
1814 CARRINGTON DR
RALEIGH, NC 27615

f. Amount: $ 8,231.00

Candidate Full Name	Office Sought	Disbursement For:
SARAH PARKER	☐ House ☐ Senate District: ☐ Council of State (specify): CHIEF JUSTICE	☐ Primary ☒ General ☐ Other (specify):
MARK MARTIN	☐ House ☐ Senate District: ☐ Council of State (specify): ASSO JUSTICE	☐ Primary ☒ General ☐ Other (specify):
PATRICIA TIMMONS-GOODSON ROBIN HUDSON	☒ House ☐ Senate District: ☐ Council of State (specify): ASSO JUSTICE	☐ Primary ☒ General ☐ Other (specify):

2. Total Disbursements THIS Page	*(sum all the 'If' entries on this page)*	$ 54,876.00
3. Total Disbursements ALL Pages	*(sum all the 'If' entries on all disbursement pages)*	$ 54,876.00

24-Hour Notice of Disbursements for Electioneering Communications

Amendment ☐ Yes ☒ No

1. Reporting Entity Information

a. Full Name of Entity Making Disbursement	c. Type *(Check one)*	d. Federal ID Number
FAIR JUDGES, NET	☐ Individual ☐ Other Organization ☒ Nonprofit Organization	20-5204162
b. Mailing Address (include City, State and Zip Code) and Phone Number	**e. Employer's Name or Principal Place of Business**	
2839 BARNETTLER ST RALEIGH, NC 27607		
	f. Occupation	

2. Period Covered Start 11-4-06 End 11-8-06

3. Were the disbursements for the electioneering communication made exclusively from donations to a segregated bank account? Yes ☒ No ☐

4. Custodian of Books

a. Full Name of Entity Making Disbursement	
SCOTT FALMLEN	
b. Mailing Address (include City, State and Zip Code) and Phone Number	**c. Employer's Name or Principal Place of Business**
2839 BARNETTLER ST RALEIGH, NC 27607	SELF
	d. Occupation
	CONSULTANT

5. Total Contributions ALL Pages	$ 2,000.00
6. Total Expenditures ALL Pages	$ 0.00

CERTIFICATION

I certify that this entity is in full compliance with Article 22E and Article 22F. I further certify that this statement is complete, true and correct.

Printed Name of Signer	Signature	Date
SCOTT R FALMLEN	Scott R Falmlen	11-9-06

NOV 09 2006
SBOE

JSB by hand

Receipts for Electioneering Communications

1. Receipt Information

a. Item Num	b. Full Name, Mailing Address & Phone (include city, state, and zip)	c. Date (mm/dd/yyyy)	d. Amount
1	BEVERLY EAGLE CAMPAIGN ACCOUNT 312 S. CLARKSON ST. CHARLOTTE, NC 28202	11-8-06	$ 2,000.00
			$
			$
			$
			$
			$

2. Total Receipts THIS Page	*(sum all the '1d' entries on this page)*	$ 2,000.00
3. Total Receipts ALL Pages	*(sum all the '1d' entries on all receipt pages)*	$ 2,000.00

Disbursements for Electioneering Communications

1. Disbursement Information

a. Item Num	b. Disbursement Date (mm/dd/yyyy)	c. Communication Date (mm/dd/yyyy)	d. Purpose (including title(s) of communication(s))

e. Full Name, Mailing Address (include city, state, and zip) & Phone	f. Amount
NONE	$

Candidate Full Name	Office Sought	Disbursement For:
	☐ House ☐ Senate District: ☐ Council of State (specify):	☐ Primary ☐ General ☐ Other (specify):
Candidate Full Name	Office Sought	Disbursement For:
	☐ House ☐ Senate District: ☐ Council of State (specify):	☐ Primary ☐ General ☐ Other (specify):
Candidate Full Name	Office Sought	Disbursement For:
	☐ House ☐ Senate District: ☐ Council of State (specify):	☐ Primary ☐ General ☐ Other (specify):

a. Item Num	b. Disbursement Date (mm/dd/yyyy)	c. Communication Date (mm/dd/yyyy)	d. Purpose (including title(s) of communication(s))

e. Full Name, Mailing Address (include city, state, and zip) & Phone	f. Amount
	$

Candidate Full Name	Office Sought	Disbursement For:
	☐ House ☐ Senate District: ☐ Council of State (specify):	☐ Primary ☐ General ☐ Other (specify):
Candidate Full Name	Office Sought	Disbursement For:
	☐ House ☐ Senate District: ☐ Council of State (specify):	☐ Primary ☐ General ☐ Other (specify):
Candidate Full Name	Office Sought	Disbursement For:
	☐ House ☐ Senate District: ☐ Council of State (specify):	☐ Primary ☐ General ☐ Other (specify):

2. Total Disbursements THIS Page	*(sum all the '1f' entries on this page)*	$ 0.00
3. Total Disbursements ALL Pages	*(sum all the '1f' entries on all disbursement pages)*	$ 0.00

24-Hour Notice of Disbursements for Electioneering Communications

Amendment ☐ Yes ☒ No

1. Reporting Entity Information

a. Full Name of Entity Making Disbursement	c. Type *(Check one)*	d. Federal ID Number
FAIRJUDGES.NET	☐ Individual ☐ Other Organization ☒ Nonprofit Organization	20-5204162
b. Mailing Address (include City, State and Zip Code) and Phone Number	**e. Employer's Name or Principal Place of Business**	
2839 BARNETTLER ST RALEIGH, NC 27607		
	f. Occupation	

2. Period Covered Start 11-9-06 End 11-14-06

3. Were the disbursements for the electioneering communication made exclusively from donations to a segregated bank account? Yes ☒ No ☐

4. Custodian of Books

a. Full Name of Entity Making Disbursement	
SCOTT PALMER	
b. Mailing Address (include City, State and Zip Code) and Phone Number	**c. Employer's Name or Principal Place of Business**
2839 BARNETTLER ST. RALEIGH, NC 27607	SELF
	d. Occupation
	CONSULTANT

5. Total Contributions ALL Pages	$ 1,000.00
6. Total Expenditures ALL Pages	$ 0.00

CERTIFICATION

I certify that this entity is in full compliance with Article 22E and Article 22F. I further certify that this statement is complete, true and correct.

SCOTT R PALMER — Printed Name of Signer

Signature

11-14-06 — Date

RECEIVED
NOV 14 2006
CAMPAIGN REPORTING

S 11-15-06

Receipts for Electioneering Communications

1. Receipt Information

a. Item Num	b. Full Name, Mailing Address & Phone (include city, state, and zip)	c. Date (mm/dd/yyyy)	d. Amount
1	BOB PAGE 105 WILLOUGHBY BLVD GREENSBORO, NC 27408	11-14-06	$ 1,000.00
			$
			$
			$
			$
			$
2. Total Receipts THIS Page	*(sum all the 'Id' entries on this page)*		$ 1,000.00
3. Total Receipts ALL Pages	*(sum all the 'Id' entries on all receipt pages)*		$ 1,000.00

Disbursements for Electioneering Communications

1. Disbursement Information

a. Item Num	b. Disbursement Date (mm/dd/yyyy)	c. Communication Date (mm/dd/yyyy)	d. Purpose (including title(s) of communication(s))

e. Full Name, Mailing Address (include city, state, and zip) & Phone	f. Amount
NONE	$

Candidate Full Name	Office Sought	Disbursement For:
	☐ House ☐ Senate District: ☐ Council of State (specify):	☐ Primary ☐ General ☐ Other (specify):
Candidate Full Name	Office Sought	Disbursement For:
	☐ House ☐ Senate District: ☐ Council of State (specify):	☐ Primary ☐ General ☐ Other (specify):
Candidate Full Name	Office Sought	Disbursement For:
	☐ House ☐ Senate District: ☐ Council of State (specify):	☐ Primary ☐ General ☐ Other (specify):

a. Item Num	b. Disbursement Date (mm/dd/yyyy)	c. Communication Date (mm/dd/yyyy)	d. Purpose (including title(s) of communication(s))

e. Full Name, Mailing Address (include city, state, and zip) & Phone	f. Amount
	$

Candidate Full Name	Office Sought	Disbursement For:
	☐ House ☐ Senate District: ☐ Council of State (specify):	☐ Primary ☐ General ☐ Other (specify):
Candidate Full Name	Office Sought	Disbursement For:
	☐ House ☐ Senate District: ☐ Council of State (specify):	☐ Primary ☐ General ☐ Other (specify):
Candidate Full Name	Office Sought	Disbursement For:
	☐ House ☐ Senate District: ☐ Council of State (specify):	☐ Primary ☐ General ☐ Other (specify):

2. Total Disbursements THIS Page	*(sum all the 'If' entries on this page)*	$
3. Total Disbursements ALL Pages	*(sum all the 'If' entries on all disbursement pages)*	$

24-Hour Notice of Disbursements for Electioneering Communications

Amendment ☐ Yes ☒ No

1. Reporting Entity Information

a. Full Name of Entity Making Disbursement	c. Type *(Check one)*	d. Federal ID Number
FAIRJUDGES.NET	☐ Individual ☐ Other Organization ☒ Nonprofit Organization	20-5204162
b. Mailing Address (include City, State and Zip Code) and Phone Number	**e. Employer's Name or Principal Place of Business**	
2839 BARMETTLER ST RALEIGH, NC 27607		
	f. Occupation	

2. Period Covered Start 11-15-06 End 11-20-06

3. Were the disbursements for the electioneering communication made exclusively from donations to a segregated bank account? Yes ☒ No ☐

4. Custodian of Books

a. Full Name of Entity Making Disbursement	
SCOTT RALMLOW	
b. Mailing Address (include City, State and Zip Code) and Phone Number	**c. Employer's Name or Principal Place of Business**
2839 BARMETTLER ST RALEIGH, NC 27607	SELF
	d. Occupation
	CONSULTANT

5. Total Contributions ALL Pages	$ 5,000.00
6. Total Expenditures ALL Pages	$ 0.00

CERTIFICATION

I certify that this entity is in full compliance with Article 22E and Article 22F. I further certify that this statement is complete, true and correct.

SCOTT R RALMLOW — Printed Name of Signer

Scott R Ralmlow — Signature

11-20-06 — Date

RECEIVED
NOV 21 2006
CAMPAIGN REPORTING

S 11-22-06 ac

Receipts for Electioneering Communications

1. Receipt Information

a. Item Num	b. Full Name, Mailing Address & Phone (include city, state, and zip)	c. Date (mm/dd/yyyy)	d. Amount
1	STEPHEN METCALF 26 HIGHLAND POINTE DR WEAVERVILLE, NC 28787	11-20-06	$ 5,000.00
			$
			$
			$
			$
			$
2. Total Receipts THIS Page	*(sum all the 'Id' entries on this page)*		$ 5,000.00
3. Total Receipts ALL Pages	*(sum all the 'Id' entries on all receipt pages)*		$ 5,000.00

Disbursements for Electioneering Communications

1. Disbursement Information

a. Item Num	b. Disbursement Date (mm/dd/yyyy)	c. Communication Date (mm/dd/yyyy)	d. Purpose (including title(s) of communication(s))

e. Full Name, Mailing Address (include city, state, and zip) & Phone	f. Amount
NONE	$

Candidate Full Name	Office Sought	Disbursement For:
	☐ House ☐ Senate District: ☐ Council of State (specify):	☐ Primary ☐ General ☐ Other (specify):
Candidate Full Name	Office Sought	Disbursement For:
	☐ House ☐ Senate District: ☐ Council of State (specify):	☐ Primary ☐ General ☐ Other (specify):
Candidate Full Name	Office Sought	Disbursement For:
	☐ House ☐ Senate District: ☐ Council of State (specify):	☐ Primary ☐ General ☐ Other (specify):

a. Item Num	b. Disbursement Date (mm/dd/yyyy)	c. Communication Date (mm/dd/yyyy)	d. Purpose (including title(s) of communication(s))

e. Full Name, Mailing Address (include city, state, and zip) & Phone	f. Amount
	$

Candidate Full Name	Office Sought	Disbursement For:
	☐ House ☐ Senate District: ☐ Council of State (specify):	☐ Primary ☐ General ☐ Other (specify):
Candidate Full Name	Office Sought	Disbursement For:
	☐ House ☐ Senate District: ☐ Council of State (specify):	☐ Primary ☐ General ☐ Other (specify):
Candidate Full Name	Office Sought	Disbursement For:
	☐ House ☐ Senate District: ☐ Council of State (specify):	☐ Primary ☐ General ☐ Other (specify):

2. Total Disbursements THIS Page	*(sum all the 'If' entries on this page)*	$ 0.00
3. Total Disbursements ALL Pages	*(sum all the 'If' entries on all disbursement pages)*	$ 0.00

EXHIBIT 4

newsobserver.com Archives

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The article you requested is displayed below.

TV ads highlight 4 candidates

Author(s): Andrea Weigl Staff Writer **Date:** October 31, 2006 **Section:** News

RALEIGH -- A television ad campaign set to start today may give a boost to four state Supreme Court candidates. But it also marks the first attempt by a new breed of independent political groups to influence North Carolina's judicial elections.

FairJudges.net, a tax-exempt organization known as a 527, will begin airing an ad naming those that the group thinks are "fair, unbiased judges" -- Chief Justice Sarah Parker, associate justices Mark Martin and Patricia Timmons-Goodson, and N.C. Court of Appeals Judge Robin Hudson, who is seeking an open seat on the Supreme Court. All but Martin are Democrats.

"The public is hungry for positive, accurate, bipartisan information about judges. FairJudges.net is providing it," Burley Mitchell, the group's leader and former chief justice of the Supreme Court, said Monday in a news release.

The ad shows images of a state flag and what appears to be the U.S. Supreme Court building. A woman's voice says, "Fairness. It's the most important quality a judge can have." She reads the four candidates' names twice, and says: "Judges who will treat all people fairly."

FairJudges.net has not said how much money it has raised. Its release listed donors, mainly Democratic-leaning entities and individuals: the N.C. Democratic Party, the N.C. Academy of Trial Lawyers PAC, the Teamsters' political committee, several trial lawyers, and others. The group was organized by Scott Falmlen, former executive director of the state Democratic Party, and Democratic consultants Bob Havely, Peter Reichard and Tim McKay.

Parker's opponent, Pitt County Superior Court Judge Rusty Duke, a Republican, said the campaign was an effort by the Democratic Party and its allies to "take over the courts."

"To start this less than a week away from the election, it's what we call in the eastern part of the state, dirty pool," Duke said in an interview.

The group is subject to a state law that prohibits money from any corporation, insurance company, labor union or professional association to be used to pay for television spots clearly identifying candidates within 60 days before an election. The group's release said, "No corporate funds are reflected on the list and all funds are permissible for use in North Carolina elections."

The ad campaign raised questions for Martin's opponent, Rachel Lea Hunter of Cary. "Every individual is entitled to the freedom of expression, but who is behind this group? Who really donates to it? Has a

violation occurred?" Hunter asked in an e-mail to The News & Observer.

Answers to Hunter's questions will not be known until later this week, when the group has to file more detailed information with the N.C. State Board of Elections.

Hudson's opponent, appeals court Judge Ann Marie Calabria said: "When government limits free speech, as it has through all the new 'campaign reform' laws, speech will find a way to make itself heard no matter what obstacles government puts in its way."

Hudson and Martin said they weren't aware of this group until they read about it in the paper.

Technical problems: If you have a technical problem with your account please e-mail newsobserver@newsbank.com.

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CASES REFERRED TO IN FOOTNOTE 4

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2. *Ray v. N. Carolina Dept. of Transp.*, ___ N.C. ___, 727 S.E.2d 675 (2012).
3. *Stark ex rel. Jacobsen v. Ford Motor Co.*, ___ N.C. ___, 723 S.E.2d 753 (2012).
4. *Cobb ex rel. Kight v. Town of Blowing Rock*, ___ N.C. ___, 722 S.E.2d 479 (2012).
5. *State v. Yencer*, 365 N.C. 292, 718 S.E.2d 615 (2011).
6. *Dobson v. Substitute Tr. Services, Inc.*, 365 N.C. 304, 716 S.E.2d 849 (2011).
7. *Raymond v. N. Carolina Police Benevolent Ass'n., Inc.*, 365 N.C. 94, 721 S.E.2d 923 (2011) .
8. *Cardwell v. Jenkins Cleaners, Inc.*, 365 N.C. 1, 704 S.E.2d 898 (2011).
9. *King ex rel. Harvey-Barrow v. Beaufort County Bd. of Educ.*, 364 N.C. 368, 704 S.E.2d 259 (2010).
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16. *Moore v. Nationwide Mut. Ins. Co.*, 362 N.C. 673, 669 S.E.2d 321 (2008).
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18. *Jones v. Harrelson & Smith Contractors, LLC*, 362 N.C. 226, 657 S.E.2d 352 (2008).
19. *Richardson v. Bank of Am., N.A.*, 362 N.C. 227, 657 S.E.2d 353 (2008).
20. *Davis v. Harrah's Cherokee Casino*, 362 N.C. 133, 655 S.E.2d 392 (2008).

21. *N. Carolina Farm Bureau Mut. Ins. Co., Inc. v. Armwood*, 361 N.C. 576, 653 S.E.2d 392 (2007).
22. *In re R.L.C.*, 361 N.C. 287, 643 S.E.2d 920 (2007).

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1. *Estate of Williams ex rel. Overton v. Pasquotank County Parks & Recreation Dept.*, ___ N.C. ___, 732 S.E.2d 137 (N.C. 2012).
2. *Stark ex rel. Jacobsen v. Ford Motor Co.*, ___ N.C. ___, 723 S.E.2d 753 (N.C. 2012).
3. *Amward Homes, Inc. v. Town of Cary*, 365 N.C. 305, 716 S.E.2d 849 (2011).
4. *Munger v. State*, 365 N.C. 3, 705 S.E.2d 734 (2011).
5. *Goldston v. State*, 364 N.C. 416, 700 S.E.2d 223 (2010).
6. *Martini v. Companion Prop. & Cas. Ins. Co.*, 364 N.C. 234, 695 S.E.2d 101 (2010).
7. *Richardson v. Bank of Am., N.A.*, 362 N.C. 227, 657 S.E.2d 353 (2008).
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